



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AP24

Driving Distance Eligibility for the Veterans Choice Program

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its medical regulations implementing section 101 of the Veterans Access, Choice, and Accountability Act of 2014, which directed VA to establish a program to furnish hospital care and medical services through eligible non-VA health care providers to eligible veterans who either cannot be seen within the wait-time goals of the Veterans Health Administration or who qualify based on their place of residence (hereafter referred to as the Veterans Choice Program, or the “Program”). VA published an interim final rule implementing the Veterans Choice Program on November 5, 2014. Under current law, VA uses a straight-line or geodesic distance to determine eligibility based on place of residence. This interim final rule modifies how VA measures the distance from a veteran’s residence to the nearest VA medical facility. This modified standard will consider the distance the veteran must drive to the nearest VA medical facility, rather than the straight-line or geodesic distance to such a facility.

DATES: Effective Date: This rule is effective on [insert date of publication in the FEDERAL REGISTER].

Comment date: Comments must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted by e-mail through <http://www.regulations.gov>; by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number.) Comments should indicate that they are submitted in response to “RIN 2900-AP24-Driving Distance Eligibility for the Veterans Choice Program.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kristin Cunningham, Director, Business Policy, Chief Business Office (10NB), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 382-2508. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On August 7, 2014, the President signed into law the Veterans Access, Choice, and Accountability Act of 2014 (“the Act,” Public Law 113-146, 128 Stat. 1754). Further technical revisions to the Act were made on September 26, 2014, when the President signed into law the Department of Veterans Affairs Expiring Authorities Act of 2014 (Public Law 113-175, 128 Stat. 1901, 1906), and on December 16, 2014, when the President signed into law the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235, 128 Stat. 2568). Section 101 of the Act creates the Veterans Choice Program (“the Program”). Section 101 requires the Secretary to enter into agreements with identified eligible non-VA entities or providers to furnish hospital care and medical services to eligible veterans who elect to receive care under the Program. Sec. 101(a)(1)(A), Public Law 113-146, 128 Stat. 1754. Veterans are eligible for the Program if they meet eligibility criteria identified in the Act; one criterion for eligibility is that a veteran who meets initial eligibility standards (being enrolled as of August 1, 2014, or who qualifies based on being recently separated from the Armed Forces following service in a theater of combat operations) can participate in the Program if he or she resides more than 40 miles from the medical facility of the Department, including a community-based outpatient clinic, that is closest to the residence of the veteran. Sec. 101(b)(2)(B), Public Law 113-146, 128 Stat. 1754. The Act required VA to implement the Program through an interim final rule, and on November 5, 2014, the Department of Veterans Affairs (VA) published an interim final rulemaking implementing the Program by creating new regulations at 38 CFR 17.1500-17.1540. 79 FR 65571. Under § 17.1510(b)(2), veterans whose residence is more than

40 miles from the VA medical facility that is closest to the veteran's residence are eligible.

The Act states that a veteran must reside more than 40 miles from the medical facility of the Department that is closest to the residence of the veteran, but does not state how that distance should be calculated. When Congress has not directly addressed the precise question at issue—here the method for calculating distance—a Federal agency charged with implementing a statute is permitted to make a reasonable interpretation of that statute. See *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Accordingly, VA may, through rulemaking, define the methodology it will use to calculate such distances between a veteran's residence and the nearest VA medical facility.

The most common methodologies for calculating the distance between two places are by using a straight-line and by following the actual driving path between the two points. In the interim final rule published in November, VA determined that it would use the straight-line distance between the veteran's residence and the VA medical facility that is closest to the veteran's residence. 38 CFR 17.1510(e). We did so consistent with language in the Conference Report accompanying the final bill prior to its enactment. 79 FR 65577. The Conference Report stated: "In calculating the distance from a nearest VA medical facility, it is the Conferees' expectation that VA will use geodesic distance, or the shortest distance between two points." H.R. Rpt. 113-564, p. 55. The shortest distance between two points is a straight line, so VA concluded that a veteran who is outside of a 40 mile radius of a VA medical facility would be eligible under this provision. 79 FR 65577.

VA also could have concluded that a driving distance calculation would have been a reasonable interpretation of the Act. Although the Conference Report language appeared to state the Conferees' expectation, other statements in the legislative history suggest Congress was not of one mind regarding how the 40 miles should be measured. For example, during the Senate floor debate on the final legislation just three days after the Conference Report was published, one of the bill's principal sponsors stated, "Mr. President, what we are talking about, really, is rather than get in a car or van and drive for 40 miles and hours and have that all reimbursed and paid for, a person will go to the local care provider." See 160 Cong. Rec. S5207 (July 31, 2014). In addition, the overall purpose of the Act is to increase access to health care for veterans. As one of the Act's main sponsors in the House said during floor consideration of the bill, "This bill will expand access to non-VA care, making wait times shorter and increase convenience." See 160 Cong. Rec. H7080 (July 30, 2014). Moreover, what affects a veteran's access when it comes to travel is how far he or she must actually travel, not the length of a straight-line route that cannot, practically speaking, be traversed. Distances are also more commonly understood in terms of travel upon actual paths, rather than along a straight line. For these reasons, the ordinary understanding of distance is also a reasonable one to adopt in this context.

This interpretation also makes sense in light of the exceptions Congress created for veterans residing 40 miles or less from the nearest VA medical facility. For example, under Sec. 101(b)(2)(D)(ii)(I), veterans are eligible if they must travel by air, boat, or ferry to reach each VA medical facility that is 40 miles or less from the residence of the veteran. Veterans also may be eligible under Sec. 101(b)(2)(D)(ii)(II) if they face an

unusual or excessive burden in accessing each VA medical facility that is 40 miles or less from the residence of the veteran due to geographical challenges. Both of these criteria explicitly consider the actual means or path of travel a veteran must take. Consequently, it is reasonable for VA to make a similar consideration when determining whether or not a veteran's residence is more than 40 miles from the closest VA medical facility.

Finally, when two interpretations of an Act are permissible, the interpretation that is more beneficial to veterans is typically preferred.

We received many thoughtful comments on this topic in response to the interim final rule we published in November. More than a third of the comments we received related to how VA measures distance for purposes of determining eligibility, and many commenters specifically argued in favor of the use of driving distance to determine eligibility based on place of residence. Other commenters suggested similar changes, such as the use of driving time. These comments came from veterans as well as providers, and show a broad interest in expanding the Program to better facilitate health care options. By contrast, VA received no comments in support of the use of geodesic or straight-line distance. This indicated to us a need to revisit VA's method of measuring distance. After doing so, VA is issuing this new interim final rule adopting the use of driving distance when measuring the distance from a veteran's residence to the nearest VA medical facility. We believe based on the public comments we received in response to the interim final rule published in November that this change to a driving distance measure will have strong support from the public. We intend to address all of

the comments prior to finalizing the rule but have decided to address this particular issue now.

Practical considerations also support promulgating a limited interim final rule addressing this issue now. The use of driving distance would result in more veterans being eligible than the use of straight-line distance, and as stated above, the general intent of the Act is to expand access to health care for veterans. Through the first 6 months of operating the Program, we have found this standard to be a limiting factor for participation in the Program. Actual utilization of the Program is well below projections made at the time of the interim final rule in November, and as a result, VA believes it is more likely to have additional resources remaining at the end of the Program's period of authorization unless we increase the population eligible to participate in the Program. While veterans could qualify for this Program under other eligibility criteria, 38 CFR 17.1510(b)(3)-(4), changing the methodology for calculating distance to driving distance rather than straight-line distance will allow more veterans to participate in the Program and receive care closer to home. VA also uses driving distance in the beneficiary travel program authorized by part 70 of title 38 of the Code of Federal Regulations. This change would make the Program more consistent with another VA program that veterans know and use.

For these reasons, we are revising the method for calculating the 40 mile distance by modifying § 17.1510(e) to use the driving distance between the veteran's residence and the closest VA medical facility, rather than the straight-line distance. VA is also removing a parenthetical exception included in this paragraph that referred to a provision in the regulations pertaining to unusual or excessive burden in traveling to a

VA medical facility. VA will calculate a veteran's driving distance using geographic information system (GIS) software.

VA is issuing this interim final rule under the same RIN as the initial rulemaking published on November 5, 2014. We intend to publish a single final rule that responds to the comments received from the November rulemaking and from this rulemaking. This will allow the public a total of 150 days (120 days following publication of the first interim final rule, and 30 days following publication of this interim final rule) to comment on this aspect of the Program.

This change will have residual effects on eligibility under § 17.1510(b)(3) and (b)(4), as these provisions are essentially exceptions that allow veterans who are not eligible under paragraph (b)(2) to be eligible to participate in the Choice Program. However, to the extent a veteran will now be eligible under paragraph (b)(2) when he or she would have qualified under paragraphs (b)(3) or (b)(4), there is no substantive change in that veteran's ability to participate in the Program or the benefits thereof. However, certain veterans who did not currently qualify under (b)(2), (b)(3), or (b)(4) may now qualify under (b)(2) as a result of this change.

Administrative Procedure Act

The Secretary of Veterans Affairs finds under 5 U.S.C. 553(b)(B) that there is good cause that advance notice and opportunity for public comment are impracticable, unnecessary, or contrary to the public interest and under 5 U.S.C. 553(d)(3) that there is good cause to publish this rule with an immediate effective date. Section 101(n) of the Act authorized VA to implement the Program through an interim final rule and provided

a deadline of no later than November 5, 2014, the date that is 90 days after the date of the enactment of the law. We do not interpret the expiration of the 90 day time period as diminishing or divesting VA of its authority to continue to implement the Program through an interim final rule. Section 101(n) of the Act clearly demonstrates Congress intended that VA act quickly in expanding access to non-VA care options.

This interim final rule changes the manner in which VA will calculate the distance requirement and will likely increase the number of veterans who are eligible for the program. Veterans who did not qualify under the straight-line methodology we previously articulated may qualify under the standard we are now establishing. In order for these veterans to have access to needed health care under the Program, it is essential that the revised driving distance requirement be made effective as soon as possible.

For the above reasons, the Secretary issues this rule as an interim final rule. However, VA will consider and address comments that are received within 30 days of the date this interim final rule is published in the Federal Register. As noted previously, the public has already had 120 days to comment on the methodology for calculating distance following the publication of the November rulemaking, and we believe the additional 30 days provided now will be sufficient to ensure the public has an opportunity to be heard on this issue.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this interim final rulemaking, represents VA's implementation of its legal authority on this subject. Other

than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious

inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined that this is an economically significant regulatory action under Executive Order 12866. VA's regulatory impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its regulatory impact analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

Congressional Review Act

This regulatory action is a major rule under the Congressional Review Act, 5 U.S.C. 801–08, because it may result in an annual effect on the economy of \$100 million or more. Although this regulatory action constitutes a major rule within the meaning of the Congressional Review Act, 5 U.S.C. 804(2), under 5 U.S.C. 808(2) it is not subject to the 60-day delay in effective date applicable to major rules under 5 U.S.C. 801(a)(3) because the Secretary finds for the reasons stated above good cause that advance notice and public procedure for this rule are impractical, unnecessary, and contrary to the public interest. In accordance with 5 U.S.C. 801(a)(1), VA will submit to

the Comptroller General and to Congress a copy of this regulatory action and VA's Regulatory Impact Analysis.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This interim final rule will not have a significant economic impact on participating eligible entities and providers who enter into agreements with VA. To the extent there is any such impact, it will result in increased business and revenue for them. We also do not believe there will be a significant economic impact on insurance companies, as claims will only be submitted for care that will otherwise have been received, whether such care was authorized under this Program or not. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are as follows: 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on April 2, 2015, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: April 17, 2015.

Michael Shores,
Chief Impact Analyst,
Office of Regulation Policy & Management,
Office of the General Counsel,
U.S. Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 38 CFR part 17 as follows:

PART 17 – MEDICAL

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.1510 by revising paragraph (e) to read as follows:

§ 17.1510 Eligible veterans.

* * * * *

(e) For purposes of calculating the distance between a veteran's residence and the nearest VA medical facility under this section, VA will use the driving distance between the nearest VA medical facility and a veteran's residence. VA will calculate a veteran's driving distance using geographic information system software.

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[FR Doc. 2015-09370 Filed: 4/23/2015 08:45 am; Publication Date: 4/24/2015]